

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. A-5697

PETITION OF BURTON S. ORANBURG

(Hearing held January 9, 2002)

OPINION OF THE BOARD

(Effective date of Opinion, April 11, 2002)

This proceeding is a petition pursuant to Section 59-A-4.11(b) of the Zoning Ordinance (Chap. 59 Mont. Co. Code 1994, as amended) for a variance from Section 59-C-1.323(a). The proposed construction of a carport requires a 22.30 foot variance as it is within 7.70 feet of the front lot line. The required setback is thirty (30) feet.

The subject property is Lot 4, Block 7, Burning-Tree Valley Section 4 Subdivision, located at 7837 Cayuga Avenue, Bethesda, Maryland, in the R-90 Zone (Tax Account No. 00653870).

Decision of the Board: Requested variance **granted.**

EVIDENCE PRESENTED TO THE BOARD

1. The petitioner testified that the terrain of the property is characterized by steep slopes that limit the siting of the carport. The petitioner testified that the carport would be located on the property's existing driveway and adjacent to an existing enclosed porch. See, Exhibit No. 3.
2. The petitioner testified that because of the significant difference in grade and the substantial growth of mature trees on his property, as shown on Exhibit Nos. 7(a)-(e), that the proposed structure would be screened from the view of the neighbor most impacted by the carport.
3. The petitioner testified that his mobility is limited because of three crushed disks in his back and neck, and because of heart problems for which he receives rehabilitation. The record contains a letter from Christine Schiller, BS, Exercise Physiologist/Cardiopulmonary Rehabilitation at Suburban Hospital, included in the record as Exhibit No. 4. The petitioner testified that he has received twice-weekly rehabilitation treatments since 1996, and that he continues to require and receive such treatment.
4. The petitioner testified that the proposed carport is required in order to provide him secure access to his automobile in inclement weather and that the submitted construction drawings for the structure demonstrate that the structure will be of open construction with a simple framing system that can be readily dismantled when no longer required. See, Exhibits Nos. 6(a) and 6(b).

FINDINGS OF THE BOARD

Based upon the petitioner's binding testimony and the evidence of record, the Board finds as follows:

The requested variance does not comply with the applicable standards and requirements of the Montgomery County Zoning Ordinance set forth in Section 59-G-3.1. However, the Board finds that the

variance can be granted as a reasonable accommodation to the petitioner's disability under Americans With Disabilities Act (ADA) provisions.

Title II of the ADA (42 U.S.C.A. §12132) has been held to apply to zoning decisions, which constitute an "activity" of a public entity within the meaning of the ADA. (*See Mastandrea v. North*, 361 Md. 107, 126, 760 A.2d 677, 687, at n.16, *citing Trovato v. City of Manchester, N.H.*, 992 F. Supp. 493, 497 (D.N.H. 1997)).

Under the ADA, a local jurisdiction is required to reasonably modify its policies when necessary to avoid discrimination on the basis of disability, unless it is shown that the modifications "would fundamentally alter the nature of the service, program or activity." 28 C.F.R. §35.130(b)(7) (1997). Therefore, unless the proposed accommodation would "fundamentally alter or subvert the purposes" of the zoning ordinance, the variance must be granted under Title II of the ADA. *Trovato*, 992 F. Supp. at 499.

The ADA defines a disability for an individual, in pertinent part, as "a physical or mental impairment that substantially limits one or more of the major life activities of (an) individual." 42 U.S.C.A. §12102(2)(A).

The Board finds that the petitioner's limited mobility, as the combined result of his spinal and heart conditions, restricts his major life activity of walking. The Board finds that the proposed construction of a carport would permit the petitioner safe access to his automobile and constitutes a reasonable modification to permit the petitioner the use and enjoyment of the premises of his residence.

The Board further finds that the proposed construction of the carport, which is designed as an open, wood frame structure, will allow the structure to be readily dismantled in the future.

Therefore, based upon the petitioner's binding testimony and the evidence of record, the Board finds that the grant of the requested variance is a reasonable accommodation of the petitioner's disability because (1) it will have a minimal impact on the adjacent neighbor; (2) the proposed construction is necessary to permit the petitioner secure movement from his house to his automobile; and (3) the proposed structure can be easily removed when no longer required for the petitioner's use.

Accordingly, the requested variance of 22.30 feet from the required thirty (30) foot front lot line setback is granted subject to the following conditions:

1. The petitioner shall be bound by all of his testimony and exhibits of record, to the extent that such evidence and representations are identified in the Board's Opinion granting the variance.
2. Construction must be completed according to plans entered in the record as Exhibit Nos. 5 and 6(a) and 6(b).
3. The variance is granted to the petitioner only, and the carport shall be removed at such time as it is no longer required in relation to petitioner's medical condition or the petitioner no longer resides on the property.

The Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the Opinion stated above is adopted as the Resolution required by law as its decision on the above entitled petition.

On a motion by Louise L. Mayer, seconded by Allison Ishihara Fultz, with Donna L. Barron, Angelo M. Caputo and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the foregoing Resolution.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

I do hereby certify that the foregoing Opinion was officially entered in the Opinion Book of the County Board of Appeals this 11th day of April, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

See Section 59-A-4.53 of the Zoning Ordinance regarding the twelve-month period within which the variance granted by the Board must be exercised.

The Board shall cause a copy of this Opinion to be recorded among the Land Records of Montgomery County.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.